No. 93-1379

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1993

Rural West Tennessee African-American Affairs Council, Inc., Minnie Bommer, Jean Carney, Dr. C.T. Boyd, Brenda Woods, Shirley Kee, Anna Faye Moore, Rev. William Smart, and Dr. Warren Dickerson,

Cross-Appellants,

v.

Ned R. McWherter, Governor of Tennessee, John Wilder, Lieutenant Governor and Speaker of the Tennessee Senate, James Naifeh, Speaker of the Tennessee House of Representatives, Will Burns, Coordinator of Elections, and Lenita McCraw, Janet Black, Judy Bishop, Ella Mae Escue, Spence Dupree, Bobbie White, and Linda Burnett, Registrars-at-Large of Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby, and Tipton Counties,

Cross-Appellees.

On Appeal From The United States District Court For The Western District Of Tennessee

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED FOR REVIEW

1. Whether voting age population is the appropriate numerical basis for assessing the results of an electoral system challenged under 42 U.S.C. § 1973, in light of the use of the word "electorate" in subsection (b) of that statute?

2. After a finding of liability under 42 U.S.C. § 1973, must the remedy require the maximum number of majority-black senate districts to be drawn in the area of violation?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

TABLE OF AUTHORITIES iii

STATEMENT OF THE FACTS 2

THE QUESTIONS PRESENTED BY PLAINTIFFS ARE EITHER PRETERMITTED BY THE STATE'S APPEAL OR SO INSUBSTANTIAL AS TO NOT MERIT PLENARY REVIEW 7

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES CITED:

Burns v. Richardson, 384 U.S. 73 (1966) 10

Burton v. Shehan, 793 F. Supp. 1329 (D.C. S.C. 1992) 12

Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) 9

Growe v. Emison, 113 S.Ct. 1075 (1993)..... 3

Jeffers v. Clinton, 730 F. Supp. 196 (E.D. Ark. 1989), *appealed dismissed*, 498 U.S. 1129 (1991)..... 12

McWherter v. Rural West Tennessee African-American Affairs Council, Inc., No. 93-1108 6

Nash v. Blunt, 797 F. Supp. 1488 (W.D. Mo. 1992), *affirmed*, 113 S.Ct. 1809 (1993).....11, 12

Reynolds v. Sims, 377 U.S. 533 (1964) 10, 11

Rural West Tennessee African-American Affairs Council, Inc. v. McWherter, 836 F. Supp. 453 (W.D. Tenn. 1993)..... 2, 3, 4, 6, 10, 12

Shaw v. Reno, 113 S.Ct. 2816 (1993)..... 3

Thornburg v. Gingles, 478 U.S. 30 (1986) 3, 7, 10

Turner v. Arkansas, 784 F. Supp. 553 (E.D. Ark. 1991)..... 12

U.S. v. Ron Pair Enterprises, Inc., 489 U.S. 235 (1989) 9

White v. Regester, 412 U.S. 755 (1973)..... 9

TABLE OF AUTHORITIES

Page

OTHER:

42 U.S.C. § 1973 ..... 2, 3

42 U.S.C. § 1973(b) 4, 8

Chapter 826 of the Tennessee Public Acts of 1992 3

S. Rep. No. 417, 97th Cong. 2d Sess. 29 (1982), reprinted in 1982 U.S.C.C.A.N. 177 (Senate Report) 4

R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 4.3 (7th Ed. 1993) 12

Webster's Encyclopedia Unabridged Dictionary, p. 459 (1989) 9

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Cross-Appellees.

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6 of the Supreme Court Rules, the cross-appellees (State) move to dismiss this cross-appeal on the grounds that judgment in favor of the State in its appeal pretermits the issues raised in this cross-appeal. The issue of whether total or voting age population is the appropriate numerical basis for assessing the

proportionality of electoral results in a challenge under 42 U.S.C. § 1973 is so insubstantial as not to require plenary review by this Court.

STATEMENT OF THE FACTS

This case involves the Tennessee General Assembly's 1992 redistricting plan for its 33-seat State Senate, Chapter 826 of the Tennessee Public Acts of 1992 (Chapter 826). Under the plan, three State Senate districts contain majority-black population. One, located in Nashville, is not at issue in this case. The other two are in Shelby County (containing the City of Memphis) in southwest Tennessee.

The cross-appellants (plaintiffs) brought this action raising constitutional and statutory challenges concerning "the effect of the 1992 plan on the voting strength of blacks living in west Tennessee." *Rural West Tennessee African-American Affairs Council, Inc. v. McWherter*, 836 F. Supp. 453, 455 (W.D. Tenn. 1993). The statutory claim – decided by the district court – was that Chapter 826 dilutes votes of African-Americans in seven counties in southwest Tennessee in violation 42 U.S.C. § 1973.[1] Specifically, the plaintiffs alleged that (a) an additional majority-black district can and must be created in Shelby County, and (b) an additional majority-black district can and must be created by attaching a portion of Shelby

[1] The area covered by the plaintiffs' claim includes Fayette, Hardeman, Haywood, Lauderdale, Madison, Shelby and Tipton Counties. *Rural West Tennessee*, 836 F. Supp. at 453.

County to portions of six (later, four) other southwest Tennessee counties. *Id.*

All of the plaintiffs' proof on the three preconditions for a vote dilution claim under *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), was limited to southwest Tennessee. *Id.* In particular, to demonstrate that a compact majority-black district could be created in rural southwest Tennessee (i.e., not wholly within Shelby County), the plaintiffs' submitted two proposed plans. One, submitted during trial, split all six of the rural counties and Shelby County. *Id.* The second plan was submitted after trial, when the plaintiffs concluded that this Court's decision in *Shaw v. Reno*, 113 S.Ct. 2816 (1993), cast doubt on the validity of their first proposed "rural" district. The second plan attaches a piece of Shelby County and a piece of Madison County (reaching up to split the city of Jackson) to all of Haywood, Fayette and Hardeman counties. *Rural West Tennessee*, 836 F. Supp. at 456 n.3.

The district court agreed with the plaintiffs that the Senate plan violated 42 U.S.C. § 1973, holding that Chapter 826 diluted African-American votes by failing to create one additional majority-black seat in southwest Tennessee. The court concluded, however, that Section 2 required the creation of only one additional majority-black district, and not two as urged by the plaintiffs on this cross-appeal. *Rural West Tennessee*, 836 F. Supp. at 467.

The district court began by addressing the three preconditions to a vote dilution claim set forth by this Court in *Gingles* and extended to single-member districts in *Growe v. Emison*, 113 S.Ct. 1075, 1084 (1993). Without

specifically focusing on the "rural districts" proposed by the plaintiffs, the district court first held that the plaintiffs' proposed alternate plans demonstrated the feasibility of additional "geographically compact" majority-black districts. *Rural West Tennessee*, 836 F. Supp. at 457. The court then found that African-American voters in southwest Tennessee were politically cohesive and that white voters in southwest Tennessee usually vote to defeat black voters' preferred candidates. *Id.* 457-60.

The court next examined the various factors bearing on the ultimate "totality of circumstances" judgment about whether African-American voters in southwest Tennessee "have less opportunity than other members of the *electorate* to participate in the political process and to elect representatives of their choice." (Emphasis added) *Id.* at 460-66 (quoting 42 U.S.C. § 1973). In assessing the electoral success of black candidates,[2] the district court held that "the proper scope of review is the entire state." *Id.* at 462. The court further determined that the proper measure of proportionality of black representation was the black *voting age* population, based upon the use of the word "electorate" in 42 U.S.C. § 1973(b). In particular, the court stated the following:

> We agree with the State, however, that the statute uses the word "electorate" and that we

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[2] The important Congressional committee report contemplates consideration of "the extent to which members of the minority group have been elected to public office in the jurisdiction." S. Rep. No. 417, 97th Cong. 2d Sess. 29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206 (Senate Report).

should measure the proportionality of black representation on the basis of black voting age population (the electorate) rather than total black population. Blacks represent a higher percentage of the total population than voting age population. The plaintiffs urge that the language of the 1982 amendment to the Act – "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion *in the population*," *Id.* (Emphasis added) – supports a conclusion that total population should be used. Plaintiffs also point to the statement in the Senate Report "[t]he principle that the right to vote is denied or abridged by voting strength derives from the one person, one vote reapportionment case of *Reynolds v. Sims.*" Senate Report at 19. *Reynolds,* noted that "one person" does not mean "one voter," it means one member of the population. *Reynolds v. Sims,* 377 U.S. 533, 560-61, 84 S.Ct. 1362, 1381, 12 L.Ed.2d 506 (1964). *Reynolds,* however, is concerned with ensuring that each district incorporates the same number of people so that voting strength of an individual does not vary by the virtue of the location of his or her residence. The language quoted from *Reynolds* is not related to the redrawing of districting lines on the basis of demographic factors and thus is not relevant to this case. [Citation omitted]. The goal of § 2 is to protect the voting strength of minority groups, which is more accurately reflected by voting age population than total population. The Supreme Court has noted that prevalence of this standard with approval. *See, e.g., Growe v. Emison,* 507 U.S. ___, 113 S.Ct. 1075, 1079, 122 L.Ed.2d 388, U.S. Lexis 1780 (1993) at 25 (noting that "to establish whether a § 2 violation has occurred . . . courts

> have looked to, not the districts total minority population, but the districts minority population of voting age" and citing *Romero v. Pomona*, 883 F.2d 1418, 1425-1426, and n.13 (9th Cir. 1989) (citing cases) and *Gingles*, 478 U.S. at 48, 50, 106 S.Ct. at 2765, 2766).

Id. at 462-63.

From this analysis the district court concluded that the statute required the creation of only one additional majority-black district in southwest Tennessee. *Rural West Tennessee*, 836 F. Supp. at 467. Based on the statewide figures for voting age population – 14.4% of whom are African-Americans – the court ruled that one additional seat was sufficient, giving a total of four out of 33 seats (or 12.1%), and that the statute did not require the state to go above the 14.4% figure to create a second additional or fifth majority-black seat or 15.2%. The district court accordingly enjoined the State from conducting any elections under the 1992 Senate plan and ordered the State to submit a new plan by January 25, 1994. *Id.* at 467. The State appealed that decision to this Court in the case of *McWherter v. Rural West Tennessee African-American Affairs Council, Inc.*, No. 93-1108. A stay request was made to the district court which was denied. Then, a stay request was made to the Circuit Justice for the United States Court of Appeals for the Sixth Circuit. That request was granted on January 20, 1994 pending disposition of the State's appeal.

THE QUESTIONS PRESENTED BY PLAINTIFFS ARE EITHER PRETERMITTED BY THE STATE'S APPEAL OR SO INSUBSTANTIAL AS TO NOT MERIT PLENARY REVIEW

This Court in *Gingles* held that "persistent proportional representation is inconsistent with [the] allegation that the ability of black voters . . . to elect representatives of their choice is not equal to that enjoyed by the white majority." *Gingles*, 478 U.S. at 77. It is the position of the State in its appeal that the district court erred by conducting such a proportionality analysis on a statewide basis instead of focusing on the particular area of the State where the violation has been found. State's Jurisdictional Statement, pp. 8-13 (No. 93-1108). Conducting such a proportionality analysis on a regional basis, as opposed to statewide basis, pretermits the plaintiffs' arguments regarding use of total population versus use of voting age population in that analysis.

The plaintiffs contend that two additional majority-black districts must be drawn – creating a total five majority-black districts – in order to reach proportionality on a statewide basis using total population. However, the addition of two majority-black districts in southwest Tennessee increases the number of majority-black districts in southwest Tennessee to a total of four districts. Those four majority-black Senate districts represent 12.12% of the 33 seats of the Tennessee State Senate. The total black population for southwest Tennessee in comparison to the entire State's population is only 8.8%.[3] Thus, the creation

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[3] The total population of Tennessee is 4,877,155. The total black population of southwest Tennessee is 430,102.

of two additional majority-black districts in southwest Tennessee would be well beyond the proportion of total black population of southwest Tennessee in relation to total population of the entire State.[4] Accordingly, if the State is correct that the proportionality analysis should focus on the affected region rather than the entire State, the issue of use of voting age population versus total population in conducting that analysis is of no consequence.

In addition to the issues in this cross-appeal being pretermitted by the State's appeal, the question of whether "electorate" means voting age population or total population is an insubstantial one which does not merit plenary review by this Court. The plaintiffs urge that, in Voting Rights Act cases, the word "electorate" should have "an expansive meaning that means both 'voters' and 'population' ". Plaintiffs' Jurisdictional Statement, p. 14. Such an argument ignores the plain and clear meaning of the word "electorate."

The plaintiffs admit that the word "electorate" means less than the total population.[5] This Court has held on a

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[4] Indeed, such a result would constitute a maximization of minority voting strength, a result expressly precluded by the proviso in 42 U.S.C. § 1973(b): "[n]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." As the Senate Report states, this provision is intended to "put to rest any concerns that have been voiced about racial quotas." Senate Report at 31.

[5] Plaintiffs' Jurisdictional Statement, p. 13 n.10. Contrary to the plaintiffs' assertions, "electorate" does not necessarily mean registered voters or actual voters but is "the body of persons

number of occasions that "the plain meaning of legislation should be conclusive, except in the 'rare cases' in which the literal application of the statute will produce a result demonstratively at odds with the intention of the drafters." *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989); *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982). To say that the word "electorate" means the same as total population runs contrary to the plain meaning of the word.

Furthermore, there is no indication in the legislative history that the drafters intended "electorate" to mean total population. In fact, the language upon which the 1982 amendment is based derives from a test developed by this Court in the case of *White v. Regester*, 412 U.S. 755 (1973). The plaintiff's burden of proof in a Voting Rights Act case was to produce evidence that supported findings that "the political processes leading to the nomination and election were not equally open to participation by the group in question – that its members had less opportunity than other *residents* in the district to participate in the political process and to elect legislators of their choice." *Id.* at 766. (emphasis added) The word "residents" as used by this Court in the *White* decision was changed to "electorate" in the 1982 amendments. Had Congress intended total population to be used in such analysis, it could have easily retained the word "resident", but it did not.

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entitled to vote in an election" which is the voting age population. *Webster's Encyclopedia Unabridged Dictionary*, p. 459 (1989).

The plaintiffs point to the statement in the Senate Report that "[t]he principle that the right to vote is denied or abridged by dilution of voting strength it derives from the one person, one vote reapportionment case of *Reynolds v. Sims.*" Plaintiffs' Jurisdictional Statement, p. 11 quoting Senate Report at 19. From this statement, the plaintiffs conclude that total population, not voting age population is the appropriate standard in light of the fact that total population was the standard for a "one person, one vote" challenge in *Reynolds v. Sims*, 377 U.S. 533 (1964).

The district court correctly rejected this argument, stating that – whatever the constitutional focus may be – "[t]he goal of § 2 of the Act is to protect the *voting strength* of minority groups, which is more accurately reflected by voting-age population than by total population." *Rural West Tennessee*, 836 F. Supp. at 463 (emphasis added). Indeed, the plaintiffs' position is inconsistent with the very nature of their "vote dilution" claim. As *Gingles* explains, such a claim is about the submergence of *voting ability* of a minority group in the results of the majority's *voting*. *Gingles*, 478 U.S. at 55-56. Not surprisingly, then, as the district court pointed out, this Court has noted with evident approval that lower courts regularly use voting age population figures in applying § 2. *Rural West Tennessee*, 836 F. Supp. at 463.[6]

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[6] We also note that it is not settled that total population must be used for equal protection clause purposes. This Court stated in *Burns v. Richardson*, 384 U.S. 73, 91 (1966) that "the Equal Protection Clause does not require the states to use total population figures derived from the federal census as the standard by which this substantial population equivalence is to be

To suggest some doubt on the issue, plaintiffs point to only two decisions of district courts, but neither of the decisions considered this issue. Ironically, the plaintiffs first cite to the case of *Nash v. Blunt*, 797 F. Supp. 1488 (W.D. Mo. 1992), *affirmed*, 113 S.Ct. 1809 (1993), for the proposition that total population rather than voting age population should be used in determining proportionality. But, the *Nash* Court, while apparently using total population, did so without consideration of any argument that voting age population was the proper proportional benchmark for assessing representation. *Id.* at 1498-99. Moreover, as the State indicated in its Jurisdictional Statement in this case, the *Nash* decision specifically supports the use of *regional*, not statewide, figures in viewing proportional representation. State's Jurisdictional Statement, p. 7 (No. 93-1108). *See also, Nash*, 797 F. Supp. at 1499 ("there is no authority to suggest that these citizens' inability to be included together in one or more districts should be 'made up' by increasing the number of minority-controlled districts in those areas of the state

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measured." The Court went on to say that neither in *Reynolds* nor in another decision had it suggested that states are required to include "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment based by which their legislators are distributed." *Burns*, 384 U.S. at 92. The Court did indicate that the "[u]se of a registered voter or actual voter basis presents an additional [constitutional] problem [because] [s]uch a basis depends not only upon criteria such as govern state citizenship, but also the extent of political activity of those eligible to register and vote." *Id.* The use of voting age population, of course, would not present such constitutional problems because political participation through voter registration is not considered.

where black citizens are most concentrated.") Following *Nash*, therefore, would defeat plaintiffs' claim.

In *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989), *appealed dismissed*, 498 U.S. 1129 (1991) a district court also apparently used "total population" in its proportionality analysis. Again, however, there was no discussion regarding the use of total population versus voting age population. Simply stated, the issue does not appear to have even been raised by the parties in *Jeffers* anymore than in *Nash*. These cases thus create no conflict with, and raise no substantial question about the correctness of, the district court's determination to use voting age population instead of total population in its proportionality analysis. *See* R. Stern, E. Gressman, S. Shapiro, & K. Geller, *Supreme Court Practice* § 4.3 (7th Ed. 1993) ("There must be a real or intolerable conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized.")

Finally, the plaintiffs argue that the use of a proportionality analysis after finding of liability "was not meant to function as an inflexible limitation on [the remedy]." Plaintiffs' Jurisdictional Statement, p. 15. Although the plaintiffs deny it, this argument leads to the inescapable conclusion that if a majority-black district can be drawn and a violation has been found, then such a district must be drawn. In other words, the voting strength of minority voters must be maximized. As the district court stated, "[t]he explicit rejection in the text of the statute of any right to *proportional* representation indicates that Congress did not intend to require *maximum* representation." *Rural West Tennessee*, 836 F. Supp. at 467. *See also, Burton v.*

Shehan, 793 F. Supp. 1329 (D.C. S.C. 1992); *Turner v. Arkansas*, 784 F. Supp. 553, 557 (E.D. Ark. 1991).

CONCLUSION

Based upon the foregoing authorities and analysis, the State urges this Court to dismiss the jurisdictional statement of the plaintiffs or, in the alternative, to affirm the district court's decision with regard to those issues raised in this cross-appeal.

Respectfully submitted,

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